STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE BLUE, Plaintiff-Appellee, v ST. JOHN HOSPITAL AND MEDICAL CENTER, Defendant-Appellant.	UNPUBLISHED October 13, 2009 No. 284769 Wayne Circuit Court LC No. 06-609722-NO

Before: Stephens, P.J., and Jansen and Wilder, JJ.

STEPHENS, J. (*dissenting*)

I disagree with the majority's opinion that the trial court erred in denying the defendant's motion for summary disposition. The majority has correctly stated the law in Michigan from *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), which requires us to find that the condition which led to the plaintiff's fall was open and obvious. The majority also applied the appropriate rule of law that finds that the risk of falls on ice does not constitute an unusually high risk of harm. Unlike my colleagues, however, I find the trial judge did not err in finding that the condition was effectively unavoidable and that defendant had constructive notice of its existence.

I. EFFECTIVELY UNAVOIDABLE

It is helpful to define the term effectively unavoidable. In the seminal case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 514; 629 NW2d 384 (2001), the Court, by way of example, offered a water-covered floor as a situation where the risk was effectively unavoidable and created high degree of likely harm. Since the term was coined in *Lugo* the courts have endeavored to give it practical meaning. In *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), the court rejected the concept that effectively unavoidable meant that the invitee is required to refuse the business owner's invitation to access the premises and must go elsewhere. The published case law on this issue is scant. However, in the unpublished case of *Schaaf v Pullman,* unpublished opinion of the Court of Appeals, issued August 6, 2009 (Docket No 282234), this court determined that a risk is effectively unavoidable if there is no other reasonable alternative. Surely, the courts would not require the invitee to increase her risk of harm to avoid the open and obvious condition. It is reason that is the base of our tort law. In this case the majority has written that the open and obvious condition that was connected to plaintiff's fall was not effectively unavoidable. They state that there were stairwells available to

her. We are confined to the record presented to the trial court in our review. The defense admits that there was snow on the uncovered areas of the parking structure. The only available avenue to access a stairwell would have required that plaintiff ambulate up a ramp covered with snow to traverse toward a stairwell. Plaintiff specifically denied that there was a stairwell that she could have gotten to from her car. Defendant did not offer a schematic diagram or any other evidence to demonstrate that this was not true. Any reasonable doubt on factual questions in a motion for summary disposition must be resolved in favor of the nonmoving party. *West v General Motors Corp*, 467 Mich 177, 183; 665 NW2d 468 (2003). The trial court, therefore correctly opined that there was evidence that the condition was effectively unavoidable.

The majority, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), has found that even if there was constructive notice of the condition at issue they could not find that defendant's actions in waiting until after the snowstorm ended were unreasonable. The majority has recognized that the reasoning of *Quinlivian* belies the conclusion that under all circumstances a premises owner has no duty to warn or protect an invitee from the risk of ice underneath snow until after the snow ceased. The facts in the light most favorable to plaintiff are that the snow continued unabated for several hours, the premises was open to business invitees and their cars, the structure was open to blowing and blustering snow and defendant did nothing. A premises owner is bound to act reasonably under the circumstances presented. It is for the jury to decide what, if anything, this defendant should have done where it invited the public to use its parking structure.

II. NOTICE

A premises owner must have either actual or constructive notice before the duty to warn or protect an invitee accrues. The determination of whether there is constructive notice is fact dependent. *Hampton v Waste Mgmt of Mich, Inc*; 236 Mich App 598, 604; 601 NW2d 172 (1999). In general all persons are held to have constructive knowledge that ice may be under snow. This court has announced, "as a matter of law[,] . . . by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes* (On Remand), 271 Mich App 61, 67; 718 NW2d 382 (2006). The condition in this case is very different from the circumstances in *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002). In *Derbabian*, the plaintiff fell on a small patch of ice created days after the last snowfall. *Id*. at 698-699. The ice was created when rain fell on the snow and was subject to freezing hours before her fall. *Id*. In the instant case, plaintiff testified that when she awoke there was a 2-inch accumulation of snow on her vehicle. The snow was blowing due to a blustery April wind. The plaintiff testified that her driving speed was reduced due to the weather conditions. She further testified that the patch of ice that she observed while on the ground covered over a foot of ground surface. The court received internet records that indicated that the airport area that was miles west of the premises where the incident occurred experienced temperatures on April 4, 2003, that ranged between 30-35 degrees, which provided the opportunity for melting and re-freezing. Those papers report that a light rain replaced the snowfall with less than one inch of additional precipitation. However, where the record offers no basis for admissibility of these hearsay documents the court cannot use these statements to create a question of fact. *Maiden v Rozwood*, 461 Mich 109, 597 NW2d 817 (1999). Therefore, the court correctly found that the plaintiff met her burden of going forward with evidence that the nature and duration of the weather condition provided the defendant with constructive notice of the risk.

III. CONCLUSION

Because the evidence properly submitted to the trial court demonstrated that the dangerous condition was effectively unavoidable and that defendant was on constructive notice of the existence of the dangerous condition, the trial court did not err in denying defendant's motion for summary disposition. I would therefore affirm.

/s/ Cynthia Diane Stephens